

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

IN RE DELTA DENTAL
ANTITRUST LITIGATION

)
) No. 1:19-cv-06734
)
) Hon. Elaine E. Bucklo
)

**DEFENDANTS’ MOTION TO DISMISS
PLAINTIFFS’ CONSOLIDATED COMPLAINT**

Pursuant to Fed. R. Civ. P. 12(b)(6) and Paragraph 19 of the Initial Case Management Order (Dkt. 95), Defendants respectfully move to dismiss Plaintiffs’ Consolidated Complaint (Dkt. 96) for failure to state a claim upon which relief may be granted. As explained in detail in the accompanying Memorandum In Support Of Defendants’ Motion To Dismiss Plaintiffs’ Consolidated Complaint (“Memorandum”), the Consolidated Complaint fails to state a claim on the following grounds:

1. Plaintiffs fail to state a *per se* claim under Section 1 of the Sherman Act, 15 U.S.C. § 1. Plaintiffs allege that three different restraints are *per se* illegal. However, two of the three restraints Plaintiffs identify—“revenue restrictions” and “price fixing”—are entirely conclusory and are not supported by any well-pleaded facts. These allegations thus cannot state a claim of any sort, much less a claim for conduct that is *per se* illegal. And Plaintiffs’ third alleged restriction—a “market allocation mechanism”—is an ancillary restraint that must be evaluated under the rule of reason as a matter of law.

2. Plaintiffs fail to state a rule-of-reason claim under Section 1 as well. Although dental insurance is an example of what the Supreme Court has called a “two-sided platform” market, *Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2280 (2018) (“*AmEx*”), Plaintiffs do not allege effects on both

sides of the market, as the *AmEx* decision requires. Plaintiffs also fail to allege cognizable product or geographic markets or market power, all of which are required to state a rule-of-reason claim.

3. In addition, Plaintiffs' claims fail for the independent reason that they have not alleged antitrust injury. Plaintiffs' purported harm (low reimbursement rates) is not the type of injury the antitrust laws protect. This is particularly true for a two-sided platform market, such as dental insurance, where it is "necessary" to "[e]valuate both sides" of the platform in order to "accurately assess competition." *AmEx*, 138 S. Ct. at 2287. The Complaint focuses on only one side of the two-sided market and fails to allege harm to competition on the platform as a whole.

4. Furthermore, Plaintiffs' claims fail because the alleged "market allocation mechanism" they identify is not the result of concerted action within the meaning of 15 U.S.C. § 1. Defendants have always had a unified interest in the licensing and management of the "Delta Dental" trademarks, such that decisions affecting the licensing and management of those marks do not deprive the market of independent centers of decision-making. Absent concerted action, Plaintiffs' Section 1 claim must be dismissed.

5. Finally, Plaintiffs' claims are barred by the McCarran-Ferguson Act, 15 U.S.C. § 1011 *et seq.*, which exempts claims related to the "business of insurance" from the scope of the antitrust laws.

For these reasons, and as set forth more fully in Defendants' supporting Memorandum, Defendants respectfully request that the Court dismiss the Consolidated Complaint with prejudice.

[Signature block begins on following page]

Dated: January 27, 2020

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CERTIFICATE OF SERVICE

I, Britt M. Miller, an attorney, hereby certify that on January 27, 2020, I caused a true and correct copy of the foregoing **DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' CONSOLIDATED COMPLAINT** to be filed and served electronically via the Court's CM/ECF system. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system. Parties may access this filing through the court's CM/ECF System.

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